Nos. 82-1005, 82-1247, and 82-1591

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OCTOBER TERM, 1983

CHEVRON U.S.A. INC., PETITIONER
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

AMERICAN IRON AND STEEL INSTITUTE, ET AL., PETITIONERS
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, PETITIONER
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

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QUESTION PRESENTED

Whether the Clean Air Act prohibits EPA from allowing a state to adopt a plantwide approach to new source review in nonattainment areas in circumstances where the state can demonstrate that its State Implementation Plan contains all of the elements required by the Clean Air Act and provides for timely attainment and maintenance of air quality standards.

PARTIES TO THE PROCEEDING

In addition to the American Iron and Steel Institute, petitioners in No. 82-1247 include the American Petroleum Institute, the Chemical Manufacturers Association, General Motors Corporation, and the Rubber Manufacturers Association. Nominal parties under Rule 19.6 include various member companies of two of the organizations that are petitioners in No. 82-1247, and a group of 81 electric power generating companies and two electric utility trade associations, all of which were intervenor-respondents in the court of appeals. Those additional parties are listed at 82-1247 Pet. iii-iv nn. 1, 2, & 3.

Respondents in these cases, in addition to the Natural Resources Defense Council, Inc., include Citizens for a Better Environment, Inc., and the Northwestern Ohio Lung Association, Inc.

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OPINIONS BELOW

The opinion of the court of appeals (82-1005 Pet. App. A1-A20) is reported at 685 F.2d 718.[1]

[1] "82-1005 Pet. App." refers to the appendix to the petition in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc., et al.*

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1982. Timely petitions for rehearing were denied on October 27, 1982 (82-1005 Pet. App. B22-B25). The petitions for a writ of certiorari were timely filed on the following dates: No. 82-1005, December 15, 1982; No. 82-1247, January 25, 1983; No. 82-1591, March 25, 1983 The petitions were granted, and the cases consolidated, on May 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Air Act, 42 U.S.C. (Supp. V) 7401 *et seq.*, are reproduced in Appendix A to the brief of the American Iron and Steel Institute. Pertinent portions of implementing regulations, 40 C.F.R. 51.18(j), are reproduced in the Addendum to this brief and at 82-1247 Pet. App. 32a-33a.[2]

STATEMENT

The 1977 Amendments to the Clean Air Act required "nonattainment" states—states that had not yet met prescribed national air quality standards—to establish a permit program (commonly called a "new source review" or "NSR" program) regulating the construction of "new or modified major stationary sources" of air pollution. The Act does not define the term "stationary sources" for purposes of this NSR program; so the Environmental Protection Agency undertook to develop one. Its regulations permit a state under certain circumstances to adopt a "plantwide" definition of "stationary source." The court of appeals held that this definition is unlawful, concluding that the EPA is bereft of any discretion to leave the states such flexibility. The question in this case is whether that court's conclusion is correct.

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[2] "82-1247 Pet. App." refers to the appendix to the petition in *American Iron and Steel Institute, et al.* v. *Natural Resources Defense Council, Inc., et al.*

The EPA regulations, first proposed in 1979 and adopted in 1981, permit (but do not require) those states that have an approved "State Implementation Plan" ("SIP") providing for timely attainment of national air quality standards to treat an entire industrial plant as a single "source." This means that the addition of equipment (and modifications to existing equipment) *within* a plant do not trigger formal new source review *if increased emissions from the new or modified unit are offset by corresponding decreases from other units at the plant*, so that aggregate plant emissions do not increase by more than de minimis amounts. The regulations also permit the states to treat each component or process unit at a plant as a separate source. Thirty-one states (or jurisdictions within states)[3] have to date availed themselves of the option to adopt the plant definition of "source."

Under either definition, new plants located in nonattainment areas are subject to new source review. Additions or alterations at existing sites, however, require review under the plantwide definition only if total emissions from the plant as a whole increase. In contrast, a definition that focuses on each process unit within the plant requires new source review whenever there is a significant increase in emissions from an individual unit, regardless of *net* impact on air quality.

In this case, the United States Court of Appeals for the District of Columbia Circuit held that the 1977 Amendments, as construed by it in prior cases, leave the Agency with no discretion to permit states to adopt a plantwide definition. The decision requires review of numerous equipment modifications that have no effect on air quality (because of intra-plant offsets), and notwithstanding that a State Implementation Plan approved by EPA provides for timely attainment of national air

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[3] Most State Implementation Plans cover an entire state. In approximately eight states, however, there is a separate plan for designated areas within the state.

quality standards. Further, while the 1981 regulations allow each state to select the appropriate definition in light of its particular pollution problems, the court of appeals imposed a uniform standard on every state.

1. In the Clean Air Act, Congress established a federal-state partnership that recognizes that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. 1857(a)(3) and 42 U.S.C. (Supp. V) 7401(a)(3).[4] See also Section 107(a), 42 U.S.C. 1857c-2(a) and 7407(a). EPA was required to establish primary and secondary National Ambient Air Quality Standards ("NAAQS"). Section 109, 42 U.S.C. 1857c-4 and 7409.[5] Primary NAAQS are designed to protect the public health; secondary NAAQS are to protect the public welfare.

Following EPA promulgation of the NAAQS, each state was required to adopt a plan, known as a "State Implementation Plan" or "SIP," to attain and maintain these NAAQS by the deadlines established in the Act. Sections 107(a) and 110(a)(2), 42 U.S.C. 1857c-2(a) and 7407(a), 42 U.S.C. 1857c-5(a)(2) and 7410(a)(2). If a SIP provided for timely attainment and maintenance of the NAAQS and otherwise complied with the requirements of the Act, the Administrator was required to approve it. Section 110(a)(2), 42 U.S.C. 1857c-5(a)(2) and 7410(a)(2). Primary standards were generally to be attained by 1975.

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[4] At the time of the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 *et seq.*, the Act was codified at 42 U.S.C. 1857 *et seq.* In 1977 the Act was further amended. As amended, the Act was reclassified to 42 U.S.C. (Supp. V) 7401 *et seq.* Where reference is made to pre-1977 provisions that were not materially changed by the 1977 Amendments, citations to both the former and present codifications are provided. We will hereinafter omit "Supp. V" in references to the current version of the Act.

[5] Pursuant to this authority, the Administrator has promulgated primary and secondary NAAQS for sulfur dioxide (SO_2), particulate matter, carbon monoxide (CO), nitrogen dioxide (NO_2), photochemical oxidants, and lead. 40 C.F.R. Pt. 50.

2. By 1975 it became clear that many areas had failed to attain primary air quality standards and thus continued to have excessive levels of pollution. Concern was also expressed that existing law might prohibit construction or modification of any industrial facility in a nonattainment area.

Congress not having acted, EPA implemented an administrative solution. In December 1976, it published an interpretive rule commonly known as the "Emissions Offset Ruling." See 41 Fed Reg. 55524-55530. The Offset Ruling imposed three conditions on the construction or modification of any major source in nonattainment areas.[6] First, emissions from existing sources in the area were to be reduced by an amount greater than the projected emissions from the proposed new or modified source. Second, state-of-the-art emissions control technology was to be installed to meet the "lowest achievable emission rate" for the particular source. Third, the owner or operator of the proposed source had to certify that all existing sources in the area under his control were in compliance with the applicable SIP, or were on an approved compliance schedule. EPA also requested that the states develop and submit revised SIPs for all areas in which the national standards had not been attained. See 41 Fed. Reg. 28600 (1976).

In 1977 Congress passed the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 *et seq.* Part D of Title I of the amended act[7] dealt with nonattainment areas. Part D had

> two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States

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[6] The Offset Ruling referred to a "major source" as "any structure, building, facility, installation or operation (or combination thereof) for which the allowable emission rate is equal to or greater than [prescribed levels]" (41 Fed. Reg. 55528 (1976)).

[7] 42 U.S.C. 7501-7508.

> greater flexibility for the former purposes than EPA's present interpretive regulations afford.

H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 211 (1977), *reprinted in* 4 Staff of Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1977*, at 2678 (Comm. Print 1978) [hereinafter *Leg. Hist.*].

Steps prescribed for nonattainment areas included submission of substantially revised SIPs for the Administrator's approval by July 1, 1979.[8] In order to be approved, a revised SIP was required to provide for attainment of the primary NAAQS by December 31, 1982.[9] Revised SIPs also had to comply with requirements set out in new Section 172(b) of the Act, 42 U.S.C. 7502(b). These included: implementation of all reasonably available control measures as expeditiously as practicable; adoption, at a minimum, of reasonably available control technology for existing sources; annual incremental reductions in emissions leading to "reasonable further progress" toward attainment; emissions limitations, schedules of compliance, and other measures necessary to meet the requirements of Section 172; and—most important for this case—a permit program governing construction of "new or modified major stationary sources" of air pollution.[10]

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[8] Prior to July 1, 1979, a state without an approved revised SIP continued to be generally subject to EPA's Offset Ruling.

[9] 42 U.S.C. 7502(a)(1). If a state demonstrated that it could not meet the 1982 deadline for attainment of the primary NAAQS for carbon monoxide or ozone, the Administrator was authorized to grant extensions to December 31, 1987. 42 U.S.C. 7502(a)(2).

[10] Section 172(b)(2), (3), (6), and (8), 42 U.S.C. 7502(b)(2), (3), (6), and (8). A stationary source is defined as "major" if it "directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant * * *." Section 302(j), 42 U.S.C. 7602(j). An existing major source is "modified" whenever its emissions increase by more than a de minimis amount, as determined by EPA. Sections 111(a)(4) and 171(4), 42 U.S.C. 7411(a)(4) and 7501(4); *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979). These significance thresholds for "modifications" apply under both the plantwide and dual definitions.

The permit program for new or modified sources—usually called the new source review ("NSR") program—was designed to correct a "major weakness in implementation of the 1970 Act": "the failure to assess the impact of emissions from new sources of pollution on State plans to attain air quality standards by statutory deadlines." S. Rep. No. 95-127, 95th Cong., 1st Sess. 55 (1977), 3 *Leg. Hist.* 1429. Section 173, 42 U.S.C. 7503, establishes the four mandatory elements for a new source review program. First, a permit may be issued only if the owner or operator of the new source obtains sufficient emission reductions in the region to offset the increased emissions from that source and allow for reasonable further progress toward attainment—or, alternatively, if the increased emissions will not exceed an allowance for growth budgeted by the state pursuant to Section 172(b)(5), 42 U.S.C. 7502(b)(5). Second, the source must be equipped with state-of-the-art emission controls meeting a standard described as the "lowest achievable emission rate" ("LAER"). Third, the permit applicant must certify compliance with the applicable State Implementation Plan for his other sources in the state. Finally, no permit may be issued unless the state is carrying out the applicable implementation plan for the relevant nonattainment area. See Section 173(1)-(4), 42 U.S.C. 7503(1)-(4).

In addition, Congress required each state to impose a limited conditional moratorium on the construction or modification of major stationary sources in nonattainment areas if the state did not have a revised Part D SIP approved by EPA on July 1, 1979. Upon approval of a revised SIP, the moratorium would be inapplicable and the construction or modification of major stationary sources would be governed by the SIP. Section 110(a)(2)(I), 42 U.S.C. 7410(a)(2)(I).[11]

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[11] An issue concerning the construction moratorium is currently under consideration by the agency. The 1977 Amendments set an attainment deadline for most primary air quality standards of De-

3a. The NSR (and moratorium) programs apply to "major stationary sources." But the term "sources" is not defined in the Act for purposes of these nonattainment programs. Since enactment of the 1977 Amendments, two competing definitions have been suggested. Under a plantwide definition, a so-called "bubble" concept is employed to treat the entire plant as a source; that is, the plant is viewed as if it were encased in a bubble that has a single emission point for the plant as a whole.[12] Under this definition, when emissions from one unit within a plant are increased or a new unit is added, the change need not undergo formal new source review if the operator can reduce emissions of the same pollutant elsewhere within the plant so that total emissions do not increase by more than a de minimis amount.[13] In contrast, under a dual definition, each process unit within a plant, as well as the plant as a whole, is viewed as a "source." Thus, any major new unit or any significant increase in emissions from an existing unit triggers

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cember 31, 1982. Some areas have, however, failed to attain that goal. Initially, as we explained in our reply brief at the petition stage (at 9 n.13), EPA concluded that the Act required the moratorium to be imposed in these regions. See 48 Fed. Reg. 4972 (1983). Subsequently, the new Administrator reexamined the issue and concluded that the moratorium was not mandatory if the state had an approved implementation plan and had made reasonable efforts to achieve attainment. See Remarks of William D. Ruckelshaus to the Annual Convention of the Air Pollution Control Association (June 23, 1983); N.Y. Times, June 24, 1983, at A10, col. 1. EPA is now in the process of formulating this policy and preparing implementing regulations.

[12] As applied in the NSR program, the bubble concept is sometimes referred to in the literature as "netting" because operations within a plant are offset or netted against each other. See, *e.g.*, Council on Environmental Quality, *Thirteenth Annual Report* 185 (1982).

[13] If total emissions do not increase by more than a de minimis amount, the change is not deemed a "modification" of the plantwide source for purposes of new source review. See page 6 note 10, *supra*.

formal new source review, even if aggregate emissions from the plant decrease or remain the same.[14]

b. In January 1979, EPA first addressed the requirements for new source review programs under Part D of the amended Clean Air Act. See 44 Fed. Reg. 3274, 3276-3277.[15] EPA indicated that it would permit states with approved revised SIPs to adopt a plantwide definition of "source";[16] states without approved revised SIPs, however, would be required to treat each individual unit as a "source" subject to new source review. In proposing this approach, EPA explained (*id.* at 3276, 3277):

> Where a state implementation plan is revised and implemented to satisfy the requirements of Part D including the reasonable further progress requirement, the plan requirements for major modifications may exempt modifications of existing facilities that are accompanied by intra-source offsets so that there is no net increase in emissions. The Agency endorses such exemptions, which would provide greater flexibility to sources to effectively manage their air emissions at least cost.
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[14] Under both definitions the plant as a whole would be subject to new source review whenever its aggregate emissions increase by more than a de minimis amount even if no individual process unit would be subject to review. This can occur when several new pieces of equipment that are "minor" emitters of pollution (see page 6 note 10, *supra*) result in a cumulative increase in emissions sufficient to constitute a "modification" of the plant as a whole. It can also occur when existing equipment is altered in a way that emissions from any individual unit do not increase by more than a de minimis amount but total emissions from the plant in the aggregate do significantly rise.

[15] This occurred in the context of a revision to the Offset Ruling and a discussion of the new requirements for SIPs.

[16] This plantwide approach was limited to modifications of existing facilities and did not apply to the addition of a major new facility (44 Fed. Reg. 3277 (1979)).

> The above exemption is permitted under the SIP because, to be approved under Part D, plan revisions * * * must contain adopted measures assuring that reasonable further progress will be made. Furthermore, * * * the measures adopted * * * must be sufficient to actually provide for attainment of the standards by the dates required under the Act * * *. Also, Congress intended under Section 173 of the Act that States would have some latitude * * * when the State plan is revised and is being carried out in accordance with Part D. Under a Part D plan, therefore, there is less need to subject a modification of an existing facility to * * * stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions.

In April 1979 EPA reiterated these considerations and adhered to its January 1979 approach. See 44 Fed. Reg. 20372, 20379.[17] In discussing the requirements for revised SIPs, the agency noted its "policy to encourage and assist states in adopting economically efficient pollution control methods" (*id.* at 20373). In particular, citing to the January 1979 discussion, EPA repeated that it "encourages states to consider allowing plants to place less control on processes where the marginal cost of control is high, in return for placing greater control where cost is low, so that the total control satisfies SIP requirements" (*id.* at 20373 n.9).

Thereafter, in September 1979, EPA formally proposed to allow states with approved SIPs to use a plantwide definition. See 44 Fed. Reg. 51924, 51958.[18] EPA explained (*id.* at 51933 (citation omitted)):

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[17] This discussion was contained in a general preamble for proposed rulemaking with respect to revised State Implementation Plans.

[18] This plantwide definition did not distinguish between modified equipment and new (or reconstructed) equipment; rather, it allowed intra-plant offsets to be applied to all changes at a plant. See 44 Fed. Reg. 51933 (1979).

> [C]omplete Part D SIPs, which contain adopted and enforceable requirements sufficient to assure attainment, may apply the approach * * * [of] plant-wide review but no review of individual pieces of equipment. * * * [T]his is only appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for attainment. If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment.

In addition, EPA noted that it proposed a consistent plantwide definition of "source" both for the new source review program in nonattainment areas and for the program for the prevention of significant deterioration—the "PSD" program—in areas that had attained national air quality standards (*id.* at 51925, 51926).[19]

In August 1980, EPA abruptly reversed its position. Instead of allowing states with approved SIPs to use a plantwide definition, it imposed an across-the-board dual definition that treats as "sources" both an entire plant and the discrete pieces of pollution-emitting equipment within the plant.[20] The states were therefore required—irrespec-

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[19] The PSD program was originally enacted as Part C of the 1977 Amendments, Sections 160-169, 42 U.S.C. 7470-7479. Designed to prevent the deterioration of air quality in areas in which ambient air is cleaner than required by national standards, it contains a preconstruction review program requiring compliance with stringent emission and technology standards. Section 165(a), 42 U.S.C. 7475(a). See *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979). Because an area can attain federal standards for one pollutant but not for another, a project in a given area can be subject to both PSD and NSR reviews.

[20] See 40 C.F.R. 51.18(j)(1)(i)-(iii) and 52.24(f)(1)-(3) (1981). The 1980 regulations defined "stationary source" to mean "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act"; the terms "building, structure, or facility" were defined to denote a plant, while "installation" was defined as "an identifiable piece of process equipment."

tive of any actual effect upon aggregate plant emissions or air quality—to subject new and modified units to new source review under all circumstances where emissions from the unit increased by more than de minimis amounts. See 45 Fed. Reg. 52676, 52696-52698 (1980). EPA believed that the dual definition was supported by the purpose of the nonattainment program to improve existing air quality (*id.* at 52693, 52697) and was consistent with the legislative history of the 1977 Amendments (*id.* at 52697). The agency recognized that applying a different definition of "source" to the NSR and PSD programs would "add[] to the complexity of the permitting process" (*ibid.*),[21] and it acknowledged the claim "that some sources may not be willing to modernize their facilities" under the dual definition (*id.* at 52698). EPA concluded, however, that such considerations were outweighed by the need to "bring in more sources and modifications for review and * * * require better pollution control technology in nonattainment areas" (*ibid.*).[22] These regulations were promptly challenged by numerous industries. See *Chemical Manufacturers Association* v. *EPA*, No. 79-1112 (D.C. Cir.).[23]

Seven months later EPA announced its intention to return to its original proposal to allow states to use a plantwide definition of "source" under the new source review program. 46 Fed. Reg. 16280 (1981); J.A. 89-96. Having reviewed the dual definition as part of "a Government-wide reexamination of regulatory burdens and complexities," and having "reevaluated all of the arguments on all sides of these definitional issues" (46 Fed.

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[21] The 1980 regulations adopted a plantwide definition of "stationary source" for PSD purposes (45 Fed. Reg. 52731 (1980)).

[22] In addition, the 1980 regulations treated substantially reconstructed process units as new sources. 40 C.F.R. 51.18(j)(1)(ix) and 52.24(f)(9) (1981). The effect of this approach was to require formal new source review of such reconstructed facilities even when emissions were not greater than those of the equipment superseded.

[23] This litigation was settled in response to the ensuing administrative developments outlined below.

Reg. 16281 (1981)), EPA concluded that neither the statute nor its legislative history provides a definition and therefore that the "question * * * involves a judgment as to how best [to] carry out the Act" (*ibid.*). The agency found that the plantwide definition was preferable because (a) the dual definition was a disincentive to modernization of facilities, resulted in a ban on modifications in areas subject to the construction moratorium notwithstanding that the project would not increase and could even reduce emission levels, and served to retard progress in air pollution control by discouraging the replacement of older, dirtier processes and equipment; (b) consistency in the definition of "source" under the NSR and PSD programs would simplify the regulations and reduce confusion and regulatory burden; and (c) the approved SIP providing for reasonable further progress and timely attainment gave adequate assurances that the purpose of the Part D program would not be impeded (*ibid.*). In addition, EPA pointed out that, even under a plantwide definition, new equipment is in any event subject to still another program—the New Source Performance Standards ("NSPS") program under Section 111 of the Act, which requires that prescribed standards of pollution control technology be applied to new equipment.[24]

EPA solicited public comments on its proposal. There was strong support for the plantwide approach.[25] Accordingly, in October 1981, EPA exercised its discretion to promulgate the plantwide definition, 40 C.F.R. 51.18(j)

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[24] The NSPS program was enacted in 1970. Section 111, 42 U.S.C. 1857c-6 and 7411. It imposes a single technology-forcing requirement and is applicable uniformly throughout the country without regard to the attainment or nonattainment of air quality standards. See *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981); *ASARCO, Inc.* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978). Unlike the NSR and PSD programs, NSPS contains an explicit definition of "source" to be used in that program. Section 111(a)(3), 42 U.S.C. 1857c-6(a)(3) and 7411(a)(3).

[25] The rulemaking record is discussed at pages 32-33 and 38-40, *infra*.

(1)(i)-(ii) and 52.24(f)(1)-(2) (see 46 Fed. Reg. 50766 (1981); J.A. 97), characterizing it as the one "best suited to the nonattainment program" (46 Fed. Reg. 50769 (1981)).[26] EPA noted that its definition conforms to the PSD definition of source, and eliminates the need to determine what particular pieces of equipment constitute a "source" under the dual definition (*id.* at 50767, 50768) —thus reducing regulatory complexity. In addition, EPA determined that the plantwide definition was in accord with Congress's intent that states play an important role in pollution control and have flexibility under the Act to balance environmental and economic goals (*id.* at 50767, 50768).

EPA emphasized that states choosing to adopt the plantwide definition "must demonstrate that their plans, as revised, continue to demonstrate [reasonable further progress] and attainment" (46 Fed. Reg. 50767 (1981)). Because "demonstration of attainment and maintenance of the NAAQS continues to be required, deletion of the dual definition increases state flexibility without interfering with timely attainment of the ambient standards, and so is consistent with Part D" (*ibid.*). EPA also reiterated that the dual definition would impede modernization of existing plants and, especially in areas subject to the construction moratorium, could actually hinder the reduction of emissions (*id.* at 50768).[27]

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[26] In the 1981 regulations, a "stationary source" is defined to mean "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act." In turn, the constituent elements "building, structure, facility, or installation" are defined in terms of the entire plant and do not refer to individual pieces of equipment. 40 C.F.R. 51.18(j)(1)(i)-(ii); 40 C.F.R. 52.24(f)(1)-(2). States retain the option to define an individual unit as a "source." 40 C.F.R. 51.18(j)(1).

[27] In the October 1981 regulations EPA also eliminated the special reconstructed source rule that had been adopted in 1980 (see note 22, *supra*), explaining that, in light of the plantwide definition of "source," a reconstruction requirement no longer was necessary because an entire plant is rarely reconstructed (46 Fed. Reg. 50767 (1981); J.A. 103).

4. On November 18, 1981, the Natural Resources Defense Council, Inc. ("NRDC"), Citizens for a Better Environment, Inc., and the Northwestern Ohio Lung Association, Inc., filed a petition for review of the EPA's October 1981 regulations in the United States Court of Appeals for the District of Columbia Circuit.[28] That court granted the petition for review and vacated EPA's regulations (82-1005 Pet. App. A20). The court acknowledged that "Part D, dense as it is, does not explicitly define what Congress envisioned as a 'stationary source' to which the permit process and construction moratorium should apply" (*id.* at A8). The court also found that the issue was not "squarely addressed in the legislative history" (*ibid.*), and it "agree[d] with EPA that 'with regard to the actual content of the definition of "source," the legislative history is at best contradictory'" (*id.* at A17 n.39 (citation omitted)). Nevertheless, the court declined to defer to the agency's regulation. Instead, the court concluded that the case was "controlled" (*id.* at A13) by two of its prior decisions, *ASARCO, Inc.* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978), and *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979), and that those cases "impelled" it to reject the plantwide definition as "impermissible" (82-1005 Pet. App. A3, A4). According to the court, those decisions, taken together, establish (*id.* at A16 (emphasis added; footnote omitted))

> a bright line test for determining the propriety of EPA's resort to a bubble concept. The bubble concept * * * is *mandatory* for Clean Air Act programs designed merely to maintain existing air quality; it is *inappropriate* * * * in programs enacted to improve the quality of ambient air.

The court "express[ed] no view on the decision we would reach if the line drawn in *Alabama Power* and *ASARCO* did not control our judgment" (*id.* at A4 n.7); instead, it summarily concluded that, because the objective of the entire nonattainment program was to improve (rather

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[28] See Section 307(b)(1), 42 U.S.C. 7607(b)(1).

than maintain) air quality, a plantwide definition of the term "source" was absolutely prohibited for purposes of the new source review program (*id.* at A17-A18).

The court deemed it irrelevant that new source review is but one element of the intricate regulatory complex constituting the nonattainment program. In addition, notwithstanding the House Report that explained that "allow[ing] States greater flexibility" is one of the "two main purposes" of Part D of the statute (H.R. Rep. No. 95-294, *supra*, at 211, 4 *Leg. Hist.* 2678), the court concluded that such flexibility is only "a method of attaining" the goal of improved air quality, but "is not an independent goal of the nonattainment scheme" (82-1005 Pet. App. A19). In the court's view, the only pertinent consideration under its "bright line" test was that the purpose of the nonattainment program falls "on the 'improving' side of the line" as between air quality maintenance and air quality improvement (*id.* at A17).[29]

SUMMARY OF ARGUMENT

The question presented in this case is whether the Administrator of EPA has discretion under Part D of the Clean Air Act Amendments to allow nonattainment states the option of using a plantwide approach to new source review in cases where the State Implementation Plan has been approved as consistent with the Act and contains adequate assurance of further progress toward and timely attainment of national air quality standards.

1. The court of appeals, although acknowledging that neither the text nor the legislative history of the Act furnishes a definition of "stationary source," invented a so-called "bright line" test of its own—a test creating a set of rigid statutory pigeon-holes whose function is to strip the Administrator of any discretion whatever in working out the details of the nonattainment program.

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[29] The court also invalidated EPA's deletion of the reconstructed facilities rule, see notes 22 and 27, *supra*, reasoning that the agency's action depended upon its adoption of the plantwide source definition (82-1005 Pet. App. A19-A20).

In so doing, the court of appeals violated fundamental principles of administrative law. Instead of deferring to the Administrator's wholly reasonable definition, the court substituted its own version of good policy and imposed on the agency—and the states—a mechanical and artificial formula not rooted in the language or history of the Act. But under the Clean Air Act, as under other statutes, this Court has made it clear that the task of formulating policy by filling in gaps implicitly or explicitly left by Congress belongs to the administrative agency authorized to administer the congressional program, and not to the courts; the Administrator's construction is to be given deference and upheld if it is reasonable. *Train* v. *NRDC*, 421 U.S. 60 (1975).

2. Measured against these standards of judicial review, the court of appeals erred in casting aside the agency's interpretation of "source"—an interpretation that is a reasonable exercise of administrative discretion fully consistent with the purposes of the Clean Air Act. Giving the states the option to use a plantwide approach to new source review represents a balanced accommodation of the multifarious purposes of the Act. In passing the nonattainment provisions of the 1977 Amendments, Congress made it clear that it wanted to achieve a reasonable balance between the policies of improving air quality and encouraging industrial growth. The plantwide definition encourages modernization and expansion by eliminating the expense and delay of new source review for equipment changes that do not materially affect *net* air quality, which is held harmless by the requirement of intra-plant offsets. It thus allows pollution to be reduced in the cheapest and most efficient way, provided that the state has an approved SIP that is consistent with the Act and provides for reasonable further progress toward and timely attainment of national air quality standards. In the meantime, new equipment is in any event subject to technology forcing regulation under the independent New Source Performance Standards program. Accordingly, the plantwide definition is sensibly

designed to effectuate the congressional purpose to encourage industrial renewal consistent with timely achievement of the goal of attainment.

3. The Administrator's decision allowing states with approved SIPs to use a plantwide definition fulfills Congress's express purpose to provide increased flexibility to the states in accommodating the policies of environmental protection and industrial growth in light of local conditions. Congress understood that in a geographically and industrially diverse nation problems of air pollution and their solutions are not uniform. The plantwide definition allows a state to adapt its attainment strategy to local conditions by dispensing with costly new source review in cases in which there is no significant increase in a plant's emissions; it allows the state to concentrate its scarce enforcement resources on those measures (*e.g.*, mobile sources or fugitive emissions) that are truly important to that state's attainment of national air quality standards.

4. The court of appeals was correct in finding that the meaning of "source" for purposes of the New Source Review program is neither explicitly defined by statute nor specifically addressed by legislative history. Contrary to respondents' assertion, the specific definition of "sources" in Section 111 of the Clean Air Act—itself ambiguous—is expressly limited to the discrete program created by that provision and does not apply to Part D. Respondents' contention that the history of the 1977 Amendments points to a congressional decision to deny the Administrator any discretion to adopt a plantwide approach is belied by the convoluted and lengthy legislative history. That history shows that Congress eliminated from the nonattainment provisions all language pointing toward a legislatively mandated definition precluding administrative discretion in defining the term "source." Insofar, then, as Congress addressed the question of how "source" should be defined in this context, its only decision was *not* to decide that question for itself. Accordingly, the normal rule—that the Administrator is to have

authority to implement the statute with respect to matters not legislatively determined—should operate. And since the Administrator exercised this discretion by adopting a regulation that effectuates the various policies of the Act, that leaves the states a sensible flexibility to adapt their attainment strategies to local circumstances, and that prevents new or modified sources from prejudicing attainment, that regulation should be sustained.

ARGUMENT

THE ADMINISTRATOR'S DECISION TO ALLOW STATES TO USE A PLANTWIDE DEFINITION OF "SOURCE" IN NONATTAINMENT AREAS IS VALID

I. THE COURT OF APPEALS' DECISION DEPRIVING THE ADMINISTRATOR OF ANY DISCRETION TO ALLOW STATES TO USE A PLANTWIDE DEFINITION OF "SOURCE" AND IMPOSING A TEST OF ITS OWN INVENTION WAS ERRONEOUS

The question presented in this case is whether it is permissible for the Administrator of EPA to allow states the option to use a plantwide definition of the term "source" under the NSR provisions of Part D of the Clean Air Act Amendments. The court of appeals correctly found that Part D of the Act, "dense as it is, does not explicitly define what Congress envisioned as a 'stationary source' * * *" (82-1005 Pet. App. A8); that this issue is not "squarely addressed in the legislative history" (*ibid.*); and that " 'the legislative history is at best contradictory' " (*id.* at 17 n.39 (citation omitted)). The court nevertheless invalidated the Administrator's determination that a state may use the plantwide definition if its SIP contains all of the elements required by the Act and provides for reasonable further progress toward and timely attainment of national air quality standards.

The decision of the court of appeals is fundamentally at odds with the most basic principles of administrative law, and constitutes an unwarranted usurpation of the authority reserved to the administrative agency. Congress having left the matter open, it was not for the court to invent a standard of its own. The decision

whether to leave the states with reasonable flexibility rather than mandating a single rigid bright line test was to be an administrative, not a judicial, decision. Thus, once again, the United States Court of Appeals for the District of Columbia Circuit has ignored this Court's admonition that "[a]dministrative decisions should be set aside * * * only for substantial * * * substantive reasons as mandated by statute [and] not simply because the court is unhappy with the result reached." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978) (citation omitted).

The court of appeals purported to derive its "bright line" test (82-1005 Pet. App. A16) from its earlier decisions in *ASARCO, Inc.* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978), and *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1978).[30] Under that test, the bubble concept is mandatory and must be applied in Clean Air Act programs that are designed to *maintain* existing air quality; conversely, it may not be applied where the purpose of the program is to *improve* air quality. Finding that the purpose of Part D of the 1977 Amendments is to improve air quality, the court concluded that the plantwide definition is prohibited under the new source review program.

This "bright line" test is wholly unjustified. The court of appeals has judicially defined the term "source" for all purposes under the Clean Air Act and has left the Administrator with no discretion whatever—a remarkable result given the court's conclusion that the text and legislative history of the Act do not provide a definition. In fact the court's test is an artificial construct, an invention extrapolated from two previous decisions involving not the NSR program but two distinct Clean Air Act programs. From these decisions the panel in this case derived a rigid and simplistic formula: the lawfulness of regulations defining the meaning of "source" for purposes of a particular Clean Air Act program turns on

[30] In fact, a reading of those cases will show that they do not support the simplistic and rigid dichotomy created by the "bright line" test formulated by the court in this case.

whether "the" purpose of "that program" is air quality maintenance or air quality improvement. This mechanical approach creates a dangerously distorting perspective. It assumes that all parts and all subparts of a complex and variegated program can be pigeonholed into one simply-stated overriding purpose. It assumes that every subsection of a complex statute works in an undifferentiated manner toward one simple end. But the various provisions of the various nonattainment and air quality maintenance programs cannot be fitted into such a mold. Of course the ultimate purpose of attainment *is* attainment—that is, eventual compliance with a fixed set of air quality standards. But Congress made clear that it wanted "reasonable economic growth" and "greater flexibility" for the states as well as "reasonable further progress * * * [toward] attainment." See H.R. Rep. No. 95-294, *supra*, at 211, 4 *Leg. Hist.* 2678 (pages 5-6, *supra*). And the various complex regulatory substructures operate in different ways with respect to these multifarious purposes. As we shall show, the plantwide approach that the Administrator made permissible is fully consistent with the statutory requirement of "reasonable further progress" toward timely attainment; it simply eliminates formal new source review where growth and efficiency can be accommodated to attainment without such review. Since the definition in this way reasonably meets the *various* purposes Congress directed the Administrator to keep in mind, it was not for the court to shunt it aside and substitute its own judgment as to what the solution to the definitional problem should be.

The Clean Air Act gives broad power to the Administrator "to prescribe such regulations as are necessary to carry out his functions under this chapter" (42 U.S.C. 7601(a)(1)). Accordingly, the court of appeals was not at liberty to intrude upon the Administrator's authority. "The power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."

Morton v. *Ruiz*, 145 U.S. 199, 231 (1974). A reviewing court is not free to overturn the Administrator "simply because it may prefer another interpretation of the statute" or because "reasonable men could easily differ as to their construction" (*INS* v. *Wang*, 450 U.S. 139, 144 (1981)). Rather, "[i]t is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute" (*Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971)), and the agency's construction of the statute "'should be followed unless there are compelling indications that it is wrong.'" *Beal* v. *Doe*, 432 U.S. 438, 447 (1977) (citations omitted).

Under the Clean Air Act itself this Court has "accorded great deference to the Administrator's construction of the * * * Act." *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976). To sustain the agency's position, the Court need not "go[] so far as to hold that * * * [its] construction of the Act was the only one it permissibly could have adopted." *Train* v. *NRDC*, 421 U.S. 60, 75 (1975). It must find only that the agency's construction of this "complex statute" is "sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency" (*id.* at 87).

Measured against these standards of judicial review, the court of appeals erred in casting aside the agency's definition of "source." Since 1979, when EPA first considered the issue after enactment of the 1977 Amendments—and with one brief deviation—EPA has interpreted its statute as authorizing it to give states with an approved SIP the flexibility to use a plantwide definition of "source." As we now show, this administrative interpretation constitutes a reasonable exercise of the Administrator's authority, one that is fully consistent with the purposes of the Clean Air Act. Because the court of appeals has substituted judicial rulemaking for this reasonable exercise of discretion, its "bright line" test must be rejected.

II. THE ADMINISTRATOR'S DECISION TO ALLOW STATES TO USE A PLANTWIDE DEFINITION OF "SOURCE" COMPORTS WITH THE POLICIES OF THE STATUTE AND IS A REASONABLE EXERCISE OF ADMINISTRATIVE DISCRETION

The regulation at issue in this case, allowing the states to adopt the "bubble" concept by using a plantwide definition of "source" for purposes of the nonattainment program, helps effectuate both of the statute's

> two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States greater flexibility for the former purpose than EPA's present interpretive regulations afford.

H.R. Rep. No. 95-294, *supra*, at 211, 4 *Leg. Hist.* 2678. The Administrator's decision to promulgate this regulation was, accordingly, a reasonable—and eminently sensible—exercise of administrative discretion, one that should not have been set aside.

A. The Plantwide Definition Of "Source" Represents A Balanced Accommodation Of The Statutory Policies Of Environmental Protection And "Reasonable Economic Growth"

1. *Congress's Purpose Was To Achieve A Reasonable Balance Between The Policies Of Environmental Protection And Industrial Growth*

The legislative history of the 1977 Amendments makes clear that the nonattainment program was designed "as a means of assuring realization of the dual goals of attaining air quality standards and providing for new economic growth [in nonattainment areas]" (H.R. Rep. No. 95-294, *supra*, at 13, 4 *Leg. Hist.* 2480). The House Report further explained (H.R. Rep. No. 95-294, *supra*, at 210, 4 *Leg. Hist.* 2677 (citation omitted)):

> [A] complete prohibition on new growth or expansion in nonattainment regions would pose very serious problems. The economic impact on certain

> urban areas of such a growth ban could be quite harmful. Similarly, certain industries pointed out in testimony the large cost increases that might be necessary if new plants had to be located in completely new areas rather than expanding existing facilities or locating new plants near existing ones.
>
> Similarly, in areas of particularly high unemployment complete restriction of growth or expansion possibilities might exaggerate unemployment or at least hinder reemployment efforts. Concern was also expressed about the aggregate impact of such growth restrictions on the general economy's recovery from the recent recession.
>
> In order to reconcile these conflicting concerns, the committee adopted [the nonattainment program]. The purpose of the provision is to permit States to allow continued growth or expansion in nonattainment areas, so long as this growth or expansion is undertaken in a manner consistent with the goals and objectives of the Clean Air Act.

Reconciling the attainment of national air quality standards with "new industrial growth" was "[o]ne of the most difficult clean air issues" that confronted the Congress. 123 Cong. Rec. 16204 (1977) (remarks of Rep. Waxman), 4 *Leg. Hist.* 3055. Congressman Rogers stated (123 Cong. Rec. 16196 (1977), 4 *Leg. Hist.* 3036-3037):

> [O]ver the past years our Nation has been beset by serious economic and energy problems. These factors have presented a new challenge requiring a midcourse correction in the 1970 Clear Air Act; corrections which will help assure our Nation's continued economic growth and vitality.

Accordingly, Part D of the 1977 Amendments "provides a new, more flexible means of assuring continued economic growth in areas now exceeding primary air quality standards while continuing toward attainment of these standards which protect public health." 123 Cong. Rec. 16196 (1977) (remarks of Rep. Rogers), 4 *Leg. Hist.* 3037. See also 123 Cong. Rec. 16197-16198 (1977) (remarks of Rep. Rogers), 4 *Leg. Hist.* 3040-3041.

The same principle was expressed during debate over the Conference Report on the 1977 Amendments. Senator Stevens observed (123 Cong. Rec. 26852 (1977), 3 *Leg. Hist.* 369):

> The measure before the Senate * * * recognizes that the goal of enhanced environmental quality must be sought in the context of other national objectives. Some of the most extensively discussed portions of this measure, in fact, are those providing a mechanism to continue economic growth at the same time we reduce pollution levels. I believe we have succeeded in providing this balance so that pollution can be abated while orderly economic growth is sustained.[31]

Likewise, the House debate on the Conference Report noted the "balance [in the bill] which can assure us of a cleaner environment and a growing economy at the same time" (123 Cong. Rec. 27069 (1977) (remarks of Rep. Carter), 3 *Leg. Hist.* 317), and it emphasized

> a proper balance between environmental controls and economic growth in the dirty air areas of America. * * * There is no other single issue which more clearly poses the conflict between pollution control and new jobs. We have determined that neither need be compromised. * * *
>
> This is a fair and balanced approach, which will not undermine our economic vitality, or environmental objectives.

123 Cong. Rec. 27076 (1977) (remarks of Rep. Waxman), 3 *Leg. Hist.* 336.[32]

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[31] Senator Muskie pointed out, with respect to state authority to sanction future growth, that "a community which is anxious to attract new capital and relies on heavy economic activity will have to show that it has a plan to achieve health standards by specific dates and at each point that major new economic activity becomes attractive, that plan will have to be checked and the time schedule reviewed to assure that a community is fulfilling its commitment." 123 Cong. Rec. 26842 (1977), 3 *Leg. Hist.* 342-343.

[32] See also National Commission on Air Quality, *To Breathe Clean Air* 1, 2-3 (1981). We note that in 1980 total expenditures for air

It was in the context of this "more flexible" and "balanced" approach that the new source review program was created to ensure that industrial growth did not worsen air quality. As the Senate Report explained, a "major weakness in implementation of the 1970 Act has been the failure to assess the impact of emissions from new sources of pollution on State plans to attain air quality standards by statutory deadlines." S. Rep. No. 95-127, *supra*, at 55, 3 *Leg. Hist.* 1429. See also *Hancock* v. *Train*, 426 U.S. 167, 194 (1976). Based on this experience, it was concluded that "[s]ome mechanism is needed to assure that before new or expanded facilities are permitted, a State demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards. * * * [This will] assure that introduction of the new source will not prevent attainment of the applicable standard by the statutory deadline" (S. Rep. No. 95-127, *supra*, at 55, 3 *Leg. Hist.* 1429). See also 123 Cong. Rec. 18018 (1977) (remarks of Sen. Muskie), 3 *Leg. Hist.* 716; 123 Cong. Rec. 18038 (1977) (remarks of Sen. Stafford), 3 *Leg. Hist.* 771.[33]

In sum, the overarching purpose of the new source review program was to assure that new plants and equipment would not prejudice the transition from nonattainment to attainment. To be sure, as the court of appeals correctly stated, the overall objective of the nonattainment provisions of Part D in their entirety is "to ameliorate the air's quality in nonattainment areas" (82-1005 Pet. App. A17) and "improve the quality of ambient air" (*id.* at A16 (footnote omitted)). But the bubble concept —permissible only in states with approved attainment plans—is in no way inconsistent with that overall objective. It assures that the quality of air will be "held

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pollution abatement and control represented $25.4 billion. Council on Environmental Quality, *supra*, at 307 (Table A-80).

[33] See also *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 346, 401 (D.C. Cir. 1979).

harmless" from new plant and equipment; at the same time it allows the other elements of the regulatory scheme to operate to assure that states will attain the required air quality. For it is important to remember that new source review is only one of an integrated complex of regulatory measures mandated by Part D. These include the requirement of reasonable further progress toward timely attainment (Section 7502(b)(3)); the implementation of all reasonably available control measures as expeditiously as practicable (Section 7502(b)(2)); the adoption, at a minimum, of reasonably available control technology for existing sources (Section 7502(b)(3)); and the development of emissions limitations, schedules of compliance, and other measures that may be necessary to achieve compliance (Section 7502(b)(8)). In addition, under the Section 111 NSPS program new equipment is independently subject to technological "quality control." See page 13 & note 24, *supra*. Given this integrated statutory scheme, it is misleading to isolate the new source review program and to assume that it was designed *all by itself* to *improve* national air quality.[34] New source review was designed to ensure that reasonable economic growth could continue without *prejudicing*—as it had under the 1970 Act—progress toward the enhancement of air quality in nonattainment areas.[35]

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[34] As the court stated in *Alabama Power Co.* v. *Costle*, *supra*, 636 F.2d at 346, "[t]he provisions for the attainment and maintenance of [national ambient air quality standards] were to operate primarily through controls on existing sources of pollution." See also L. Lave & G. Omenn, *Clearing the Air: Reforming the Clean Air Act* 46 (1981). For example, in Houston, Texas—an area that has experienced substantial growth in recent years—emissions from new sources account for less than 1% of the total emissions inventory for ozone. See *Clean Air Act Oversight: Hearings Before the Senate Comm. on Environment and Public Works*, 97th Cong., 1st Sess., Pt. 2, at 169 (1981).

[35] A similar purpose animates the construction moratorium: to prevent a worsening of pollution while the state prepares a revised SIP in conformity with the 1977 Amendments (44 Fed. Reg. 38471, 38472 (1979); *id.* at 51936). In addition, the moratorium serves to

2. *The Plantwide Definition Of "Source" Serves To Ensure That "Reasonable Economic Growth" Does Not Prevent Attainment Of Air Quality Standards*

A plantwide definition of "source" is well suited to promoting the objectives of the new source review program: allowing growth without threatening the attainment of national air quality standards. Under this definition, the expansion or alteration of a plant is not subject to new source review if emissions elsewhere in the plant are correspondingly reduced, so that there is no significant impact on air quality.[36] In addition, the State Implementation Plan must contain all of the elements required by the Clean Air Act and provide for reasonable further progress toward and timely attainment of air standards. In this way, economic expansion and industrial modernization are facilitated without impeding the goal of achieving improved air quality.

The economic issues at stake in achieving a "balanced approach" (see 123 Cong. Rec. 27076 (1977), 3 *Leg. Hist.* 336) were accurately set forth by the court of appeals in its prior decision in *Alabama Power Co.* v. *Costle*, *supra*, holding that a plantwide definition of "source" is applicable to the preconstruction review program for the prevention of significant deterioration ("PSD") in attainment areas (636 F.2d at 401):

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provide an incentive for states promptly to develop and submit revised SIPs (*ibid.*). Like the NSR program, the construction moratorium is designed to ensure that new "sources" do not exacerbate the levels of pollution and thereby prevent reasonable further progress and timely attainment.

[36] As explained above (see page 6 note 10, *supra*), a source is "modified" whenever its emissions increase by more than the de minimis levels. These significance levels—which, we note, apply under both the plantwide and dual definitions—are extremely modest. For instance, the de minimis level for sulfur dioxide is 40 tons per year. 40 C.F R. 51.18(j)(1)(xiii); 40 C.F.R. 52.24(f)(13). By contrast, in 1978 total sulfur dioxide emissions in the United States were 29.7 million tons. National Commission on Air Quality, *supra*, at 288 (Table 47).

> It is important first to recognize that alterations of almost any plant occur continuously; whether to replace depreciated capital goods, to keep pace with technological advances, or to respond to changing consumer demands. * * * To apply * * * [a process-unit] construction of "increase," however, would require PSD review for many such routine alterations of a plant; a new unit would contribute additional pollutants, these increases could not be set off against the decrease resulting from abandonment of the old unit, and thus the change would become a "modification" subject to PSD review. Not only would this result be extremely burdensome, it was never intended by Congress in enacting the Clean Air Act Amendments.

Here, too, a plantwide definition "will allow for improvement of plants, technological changes, and replacement of depreciated capital stock, without imposing a completely disabling administrative and regulatory burden" (636 F.2d at 400).[37] On the other hand, the dual definition can impose new source review on even routine changes in a single piece of equipment. The resulting expense and delay create a substantial disincentive to expand capacity or replace outmoded and inefficient equipment, hampering growth and retarding modernization. See 46 Fed. Reg. 16281 (1981); *id.* at 50766, 50767-50768.[38]

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[37] Similarly, the plantwide definition is consistent with the purposes of the construction moratorium (see pages 27-28 note 35, *supra*). Because of offsetting reductions within the plant, the plantwide definition ensures that an expansion or modernization project will not produce significant net increases in emissions and thus worsen air quality while the state is preparing its SIP. And, since the moratorium prohibits both the construction of all new plants and the renovation of existing plants for which there is an emissions increase, the state has a strong incentive promptly to develop and submit a SIP in compliance with federal requirements. See 46 Fed. Reg. 50769 (1981).

[38] "No aspect of the Clean Air Act is more frustrating to industry than the expensive analyses, multiple delays, and uncertainties in

A simple example will illustrate the point. Consider a plant with two pieces of equipment, each emitting 500 units of pollution. Suppose that it is economically desirable to modernize and expand the capacity of machine *A*, leading to an increase in its emissions to 700 units, and that at the same time emissions from machine *B* would be correspondingly reduced from 500 to 300 units. It would surely be review for review's sake here to require the project to undergo the expense and delay of new source review, since the project would have no adverse impact on air quality. Now assume that machine *A*, if subject to new source review (including its requirement that LAER technology be installed) under the dual definition, would emit 600 units of pollution after expansion. Assume that the LAER technology would cost $2 million [39] and that the company would have to spend an additional $.5 million to reduce the emissions from machine *B* by 101 units in order to offset the 100-unit increase at machine *A*, as required by Section 173(1)(A). Assume also that the company could reduce emissions from machine *B* by 200 units at a cost of $1 million. In these circumstances, the dual definition would entail an expenditure for pollution control of $2.5 million (plus the additional costs of new source review). On the other hand, under the plantwide definition, the project would not be subject to new source review and would involve a cost of only $1 million. The dual definition might completely deter the proposed expansion and modernization

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the permit process for construction or modification of plants." L. Lave & G. Omenn, *supra*, at 38-39. See also *id.* at 46. It has been found that the median time for new source review permits to be processed and approved is three to five months, with more than 25% of the permits taking a longer time. National Commission on Air Quality, *supra*, at 139-140.

[39] The alternative of reducing pollution from expanded machine *A* by circa 200 units, so that the project would not be a "modification" subject to NSR, if feasible at all, would necessarily exceed the cost of installing LAER technology and hence make the project even more expensive.

even though the project would not adversely affect air quality. And even if the project goes forward, the dual definition has increased the cost of modernization by $1.5 million without benefiting air quality.

Our example illustrates that the plantwide definition is consistent with the objectives of the NSR program. It ensures that emissions from new or modified sources do not prejudice attainment; it requires review of those projects that could interfere with achievement of national air quality standards. It also facilitates the statutory policies of industrial growth and modernization by eliminating the costs necessary to comply with new source review for projects that do not adversely affect air quality. And it gives a plant owner the flexibility to control emissions in the most efficient manner.

The economic benefits of this flexible approach were explained in a recent study by the Brookings Institution:

> Economists have proposed that economic incentives be substituted for the cumbersome administrative-legal framework. The objective is to make the profit and cost incentives that work so well in the marketplace work for pollution control. * * * [The "bubble" or "netting" concept] is a first attempt in this direction. By giving a plant manager flexibility to find the places and processes within a plant that control emissions most cheaply, pollution control can be achieved more quickly and cheaply.

L. Lave & G. Omenn, *Cleaning the Air: Reforming the Clean Air Act* 28 (1981) (footnote omitted); see also *id.* at vii, 18-19, 46, 48. Likewise, the Council on Environmental Quality has noted that "[i]n the case of air quality management, several studies indicate that there are many market-based opportunities for cleaning the air and reducing air pollution costs at the same time." Council on Environmental Quality, *Thirteenth Annual Report* 181 (1982) (footnote omitted). In view of these advantages, the Council has recommended that

> greater attention be focused on the use of cost/benefit analysis and the use of market-based ap-

proaches to environmental management. These analytical and regulatory tools offer potential for continuing environmental improvement while reducing the incremental costs of such improvements. In times of general economic austerity and high unemployment, it is important to explore alternative, more economically efficient approaches to the "command and control" kinds of regulatory programs now in general use.

Id. at 176.[40]

Comments submitted to EPA in the rulemaking proceeding both by industry [41] and the states also support the

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[40] Although no specific study has yet been made of the economic impact of the plantwide definition in the NSR program, generic studies indicate that uniform "command and control" measures typically have costs two to 10 times greater than flexible methods. See A. Kneese, *Economics and the Environment* 163-164 (1977); Zerbe, *Optimal Environmental Jurisdictions*, 4 Ecology L.Q. 193, 215 (1974). The General Accounting Office has found that studies of economic incentive approaches "suggest that our environmental targets can be achieved at only a modest fraction of the costs under traditional command and control programs. Estimates of the static savings in abatement costs for particular pollutants range from about 40 percent to about 90 percent * * *." U.S. General Accounting Office, *PAD-82-15, A Market Approach to Air Pollution Control Could Reduce Compliance Costs Without Jeopardizing Clean Air Goals* 34 (Mar. 23, 1982). And studies of pollution reductions from existing emission points at a plant indicate that a flexible approach will have a cost that is between 25% and 63% lower than a point-performance standard to achieve the same air quality result. See Maloney & Yandle, *Cleaner Air at Lower Cost: Bubbles and Efficiency*, Regulation, May-June 1980, at 49, 51; *Air Pollution—Kahn Stresses Analyzing Marginal Costs of Standards*, [9 File Binder] Env't Rep. (BNA) 2131 (Mar. 23, 1979) (statement of Alfred Kahn, Chairman of the President's Council on Wage and Price Stability).

[41] For example, a utility company noted that the plantwide definition would "encourage industry to modernize existing facilities through retrofit or replacement of old equipment and should speed progress toward * * * more efficient emissions controls." C.A. App. 147 (Southern California Gas Company). A pharmaceutical company stated that the plantwide definition would "in-

conclusion that the plantwide definition would promote both the growth and modernization of industry and the economically efficient control of emissions. For example, the New York State Department of Environmental Conservation commented (J.A. 128-129):

> The main outcome of requiring individual review of each new piece of equipment at a plant in a non-attainment area was to preclude any modernization. No flexibility was permitted a source owner in selecting options. In many cases, it was simpler and cheaper to operate old, more polluting sources than to trade up. * * *
>
> The previous definition requiring individual review of any new unit would be fine if there were an infinite amount of investment capital available and an incentive for scrapping existing equipment.[42]

In fact, these comments show that the plantwide definition can lead to greater reduction in emissions than the dual definition, because it encourages the replacement of older, highly polluting machinery with newer, cleaner equipment. See 46 Fed. Reg. 16281 (1981); *id.* at 50766, 50767-50768. Once again consider a plant with two machines each discharging 500 units of pollution. Customer demand justifies expanding machine *A*, which would then emit 700 units of pollution. Assume that emis-

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crease[] flexibility and * * * enhance economic incentives" and would "encourage the * * * replace[ment of] older equipment." C.A. App. 156 (Upjohn Company). A paper manufacturer pointed out that it would be able to reduce plantwide emissions in order to utilize a new printing press that would not have been installed under the dual definition. J.A. 131 (Crown Zellerbach). And the comments of a major trade association offered an example of a modernization project that would be feasible under a plantwide definition but would be put off if the dual definition were applicable to require new source review. C.A. App. 198-199 (Chemical Manufacturers Association). See also C.A. App. 234 (American Iron and Steel Institute); C.A. App. 136 (National Steel Corporation); C.A. App. 67 (Union Oil Company).

[42] See also J.A. 136-137 (Arizona Department of Health Services).

sions from machine *B* could be reduced to 250 units by modernization costing $1 million and that the cost of reducing the pollution from machine *A* to 500 units is $3 million. Under the plantwide definition, the project—which would result in a net emissions *reduction* of 50 units—would not be subject to new source review, and would cost $1 million for pollution control.[43] Under the dual definition, new source review would be required—notwithstanding the overall decrease in pollution levels—unless emissions from the expanded machine were reduced at a cost of $3 million, which could render the project uneconomical. The alternative of complying with the new source review requirements might be no better, for the expense and delay could make it impractical to expand. The consequence of applying the dual definition might thus be that the equipment would not be expanded or modernized and the emissions from the plant would not be reduced.[44]

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[43] In addition, as some commentators have noted, the "bubble" or "netting" concept may serve as an incentive for developing cost-effective pollution control technology. See Note, *An Overview of the Bubble Concept*, 8 Colum. J. Envtl. L. 137, 155 (1982), citing Landau, *Economic Dream or Environmental Nightmare? The Legality of the "Bubble Concept" in Air and Water Pollution Control*, 8 B.C. Envtl. Aff. L. Rev. 741, 742-743 n.6 (1980).

[44] This consideration is especially significant in areas in which the construction moratorium is in effect. The moratorium prohibits the modification of a "source" even though the proposed project, by installing newer equipment or utilizing cleaner operations, would effect a net reduction in total emissions from the plant. In this situation, the dual definition bars modernization projects that would be of environmental (as well as economic and commercial) advantage. See 46 Fed. Reg. 16281 (1981); *id.* at 50768. Several comments in the administrative record emphasized this concern and presented examples of environmentally desirable modernizations that could not go forward under the dual definition because of the moratorium. See the comments of: American Iron and Steel Institute (C.A. App. 234); American Textile Manufacturers Institute (J.A. 133-134); Chemical Manufacturers Association (C.A. App. 198-199); Chevron (C.A. App. 163); Congressman George Miller of California (J.A. 135); Louisiana-Pacific Corporation (J.A.

In sum, the "bubble" concept not only makes eminent economic sense, but carries out with precision Congress's expressly stated purpose of encouraging economic growth and industrial renewal without prejudicing the timely attainment of national air quality standards.[45]

B. The Administrator's Decision To Allow States To Use A Plantwide Definition Of "Source" Effectuates Congress's Purpose To Increase State Flexibility In Selecting The Detailed Methods Deemed Necessary To Attain National Air Quality Standards

The regulations in issue in this case, giving states with an approved SIP the choice of using the plantwide definition of "source" for purposes of the new source review program, properly allow the states discretion in the selection of the particular means of implementation and enforcement necessary to attain required air quality.

1. From the first congressional efforts in 1955 to improve the quality of our Nation's air (Act of July 14, 1955, ch. 360, 69 Stat. 322 *et seq.*) to the present, the

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118-119); National Steel Corporation (C.A. App. 135); New York State Department of Environmental Conservation (J.A. 128-129); Standard Oil Company (SOHIO) (C.A. App. 140); United States Department of Energy (C.A. App. 117); Upjohn Company (C.A. App. 156).

[45] The Administrator also found that the use of the same definition of "source" in the NSR and PSD programs would "reduce regulatory complexity" (46 Fed. Reg. 50767 (1981)). First, because a given project can be subject to both NSR and PSD review (since an area can be in nonattainment status for one pollutant and attainment status for another pollutant), such consistency of definition "simplifies the permit process" by determining for both reviews whether the project is or is not a "source" (*id.* at 50768). Second, the plantwide definition eliminates the difficulty of determining exactly what individual process units within a complex and integrated industrial operation would qualify as "sources" under the dual definition (*id.* at 50767, 50768). In fact, there is some indication in the legislative history of the 1977 Amendments that Congress contemplated that the meaning of the term "source" would be the same for the NSR and PSD programs. See H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 127, 128 (1977), 3 *Leg. Hist.* 507, 508.

states have been vested with primary responsibility for the control and prevention of air pollution at its source. The Court's cases prior to the 1977 Amendments have reviewed this development. See *Train* v. *NRDC*, 421 U.S. 60, 63-65, 86-87 (1975); *Hancock* v. *Train*, 426 U.S. 167, 169 (1976); *Union Electric Co.* v. *EPA*, 427 U.S. 246, 250, 256-257 (1976).[46] The keynote, as the Court observed in *Train* v. *NRDC*, *supra*, 421 U.S. at 79 (footnote omitted), is that EPA, as the federal agency,

> is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met.

"Each State is given wide discretion in formulating its [State Implementation Plan]. * * * So long as the national standards are met, the State may select whatever mix of control devices it desires." *Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 250, 266.

These principles were not changed by the 1977 Amendments. On the contrary, the House Report on the 1977 Amendments stated that one of the principal purposes of Part D was "to give the States *more* flexibility in determining how to protect public health while still permitting reasonable new growth" (H.R. Rep. No. 95-294, *supra*, at 213, 4 *Leg. Hist.* 2680 (emphasis added)). Once the requirements of federal law are met, "the State may choose whatever mix of continuous emission reduction measures and strategies it wants to meet the requirements of [Part D]" (*ibid.*).[47] The Senate likewise emphasized the need for state authority and flexibility:

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[46] See also Sections 101(a)(3) and 107(a), 42 U.S.C. 1857(a)(3), 7401(a)(3) and 1857c-2(a), 7407(a).

[47] See also 123 Cong. Rec. 15928 (1977) (remarks of Rep. Preyer), 4 *Leg. Hist.* 3022; 123 Cong. Rec. 16194-16195 (1977) (remarks of Rep. Meeds), 4 *Leg. Hist.* 3031-3032; 123 Cong. Rec. 16197 (1977) (remarks of Rep. Rogers), 4 *Leg. Hist.* 3038.

> The authority of States and localities to implement air pollution control programs within the framework of a national policy must be encouraged. *The framework proposed in this bill is flexible in terms of the discretion in choosing methods for attaining firm national goals.*

S. Rep. No. 95-127, *supra*, at 10, 3 *Leg. Hist.* 1384 (emphasis added); see also S. Rep. No. 95-127, *supra*, at 3, 3 *Leg. Hist.* 1377.[48]

State discretion was thought to be necessary because both the problems of air pollution and their solutions are diverse and vary from area to area:

> Obviously, air pollution is a national problem requiring a national approach, but neither the problem nor the solutions are the same in various parts of the country. Geography, population density, degree of industrial concentration, land characteristics, and many other factors contribute to the variation that causes or mitigates pollution. For those reasons, [the bill] gives States primary responsibility for air pollution control on the theory that they are best suited to assess local conditions and needs and to most effectively enforce the controls necessary to achieve acceptable emission levels.
>
> In carrying out that responsibility, States and local governments are assigned *increased authority to develop and carry out implementation plans and flexibility in choosing the best approach within the broad framework of the national plan.*

123 Cong. Rec. 18042 (1977) (remarks of Sen. Randolph; emphasis added), 3 *Leg. Hist.* 778. Congress also believed that this approach represents a proper division of political responsibility between the national government and the states:

> These Amendments tell the American people that * * * the National Government realizes that change without an adequate underpinning cannot be forced;

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[48] See also *Alabama Power Co.* v. *Costle*, *supra*, 636 F.2d at 364.

> that local decisions locally arrived at with proper incentives, can achieve the goals we share.

123 Cong. Rec. 26841, 26842 (1977) (remarks of Sen. Muskie), 3 *Leg. Hist.* 341, 343.

Congress's concern with flexibility and sensitivity to local concerns was, in this context, based on more than abstract considerations of federalism. This Court has pointed out that the preparation of a State Implementation Plan is "a comprehensive planning task of the first magnitude" (*Train* v. *NRDC*, *supra*, 421 U.S. at 68). In striving to attain federal air quality levels, a state must inventory and control emissions that arise in a wide variety of ways within its borders. In any given nonattainment area, pollution can be caused by "minor" sources as well as major ones,[49] by mobile sources such as automobiles and trucks as well as by stationary sources, and by fugitive emissions such as windblown dust, unpaved roads, agricultural activities, and construction projects. The relative importance of each of these varies from area to area. And each of these causes of pollution poses a distinct control problem and requires different abatement efforts.

2. The regulations at issue here were expressly characterized by the Administrator as

> consistent[] with the purposes of Part D of the Act. Congress expressly provided that states are to play the primary role in pollution control * * * [and] intended that states retain the maximum possible flexibility to balance environmental and economic concerns in designing plans to clean up nonattainment areas. Today's action follows this mandate by allowing states much greater flexibility in developing their nonattainment area [new source review] programs and attainment demonstrations.

46 Fed. Reg. 50767 (1981) (citations omitted).

The administrative record in this case fully supports the Administrator's determination. Of the nine state,

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[49] A minor source is one that omits less than 100 tons per year of pollution. See page 6 note 10, *supra*.

regional, or local governmental agencies that participated in the 1981 rulemaking proceeding, seven favored the elimination of the mandatory dual definition and the optional use by the state of a plantwide definition consistent with that in the PSD program.[50] In fact, 31 states (or jurisdictions within states) have sought to modify their State Implementation Plans to adopt the plantwide definition (see page 3 & note 3, *supra*).

More particular examples of the significance of regional variations in the causes and control of pollution also dot the record. In its comments in the rulemaking proceeding, Arizona pointed out (J.A. 136) that application of the dual definition "would have had no substantial effect upon attainment status" in that state and would serve only "to deprive the State of its latitude in choosing [an] implementation strategy for Section 173 of the Act that would best fit local conditions * * *"[51]

[50] See comments of: the Arizona Department of Health Services (J.A. 136-137); California Air Resources Board (J.A. 154-155); Erie County, New York, Department of Environment and Planning (J.A. 153); Missouri Department of Natural Resources (J.A. 130); New York State Department of Environmental Conservation (J.A. 128-129); Ohio Environmental Protection Agency (J.A. 138); Ohio Regional Air Pollution Control Agency (J.A. 120-121). The only state comments in opposition to the plantwide definition were submitted by the Maryland Department of Health and Mental Hygiene, Office of Environmental Programs (J.A. 139-140) and the Pennsylvania Department of Environmental Resources (J.A. 122-127). In addition, in the 1979 rulemaking, the Alabama Air Pollution Control Commission (C.A. App. 75) and the New Hampshire Air Resources Commission (C.A. App. 110) submitted comments supporting the plantwide definition.

[51] In Arizona there were "only two urban nonattainment areas and the primary cause of both is the automobile * * *" (J.A. 136). In these circumstances, "no strategy applied to any stationary source would make any significant difference" (*ibid.*). The plantwide definition allows the state the flexibility to design an attainment strategy—such as one focusing on automobile emissions—that would be most effective in light of the state's specific situation. See also J.A. 162-166 (affidavit of Milton Feldstein) (automobile sources are of far greater importance to air quality in the San Francisco area than new or modified stationary sources).

Comments from Ohio indicated that Ohio has devised an attainment strategy that is broader and more encompassing than federal requirements. (J.A. 120-121, 138).[52] In various counties in western states, nonattainment is primarily attributable to fugitive emissions such as windblown dust, and in 1980 this problem resulted in 23 counties in five states being out of compliance with the national standard for total suspended particulates. National Commission on Air Quality, *To Breathe Clean Air* 114 (1981). Since such fugitive emissions "are not susceptible to traditional control strategies" (*ibid.*), the pollution in these areas would not be affected by using the dual definition of "source." See also *id.* at 118-119.

In enacting the 1977 Amendments Congress was aware of this complexity and diversity in the causes of air pollution.[53] It recognized the importance of flexibility in the design of emission control strategies adapted to the specific pollution problems faced by particular states. Its intention was that states be able to focus their efforts in the way best suited to their local and regional problems. As EPA noted in a related context, state "reviewing authorities have limited resources * * *." 41 Fed. Reg. 55525 (1976). The plantwide definition enables each state to focus its scarce implementation and enforcement resources on problems that truly matter. In contrast, the dual definition requires states to undertake new source review of individual units without regard to regional circumstances.

It is common ground that the need for state flexibility cannot excuse noncompliance with the requirements of the Clean Air Act. States must have a new source review program that comports with federal law. Compare 82-

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[52] Ohio reviews minor as well as major new emissions and requires that all such "individual equipment installations" employ the "best available technology" to control pollution (J.A. 120). See also J.A. 154-155 (California Air Resources Board).

[53] See e.g. 123 Cong. Rec. 18018, 26842 (1977) (remarks of Sen. Muskie), 3 *Leg. Hist.* 715, 342; 123 Cong. Rec. 16679-16680 (1977) (remarks of Rep. Daniel), 4 *Leg. Hist.* 3214.

1005 Pet. App. A19. But the statute provides no legislative definition of the term "source" for purposes of such new source review. By permitting the use of a plantwide rather than a dual definition, the Administrator in effect allows each state to make an informed and sensitive judgment on whether equipment-oriented (rather than plant-oriented) new source review is best suited to its overall pollution control strategy—a strategy embodied in an EPA-approved State Implementation Plan that must conform to all federal requirements and provide for reasonable further progress toward and timely attainment of national air quality standards. The Administrator's decision to accord the states that flexibility should be sustained.[54]

III. THE TEXT AND LEGISLATIVE HISTORY OF THE CLEAN AIR ACT DO NOT PRECLUDE THE ADMINISTRATOR FROM ALLOWING STATES TO USE A PLANTWIDE DEFINITION OF "SOURCE" FOR PURPOSES OF THE NONATTAINMENT PROGRAM

The court of appeals found that Part D of the 1977 Amendments to the Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source' to which the permit process and construction moratorium should apply" (82-1005 Pet. App. A8). The court also found that the legislative history of the Amendments does not "squarely address[]" the question (*ibid.*), and it "agree[d] with EPA that '[w]ith regard to the actual

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[54] Of course, it is possible—as the Administrator has recognized (see 46 Fed. Reg. 50767 (1981))—that use of the dual definition might be necessary in order for a given state to be able to demonstrate reasonable further progress and ultimate attainment. In those cases the state would not be free to use the plantwide definition, and a SIP containing the plantwide definition would not be eligible for EPA approval. If in any instance respondents believe that a specific plantwide definition will prevent the required progress and attainment, they may seek to challenge EPA's approval of *that* SIP in the court of appeals under Section 307(b)(1) of the Act, 42 U.S.C. 7607(b)(1).

content of the definition of "source," the legislative history is at best contradictory'" (*id.* at A17 n.39 (citation omitted)).

In their brief in opposition, respondents took issue with these conclusions. Relying on both the language and history of the Act, respondents contended that "[t]he Act * * * *does* determine the meaning of the term 'source' and the scope of the permit provisions in the nonattainment areas" (Br. in Opp. 10). In their view, Congress fixed the meaning of the word "source" in accordance with the dual definition, and the Administrator has no more discretion in this respect than if that definition had been included in the statute and enacted into law in haec verba.

We assume that respondents will discuss these contentions further in their brief on the merits, and a complete response must necessarily await our reply brief. At this juncture, we simply outline the principal considerations that indicate that the court of appeals was correct in its conclusion that the statute and legislative history do not foreclose the Administrator's discretion to allow states to use a plantwide definition.

1. The nonattainment provisions of Part D of the 1977 Amendments do not themselves contain a definition of the term "source." Nor is that term defined in the general definitional section of the Clean Air Act. See 42 U.S.C. 7602. Respondents have not contended otherwise.

Respondents have contended (Br. in Opp. 14, 15) that the definition of "source" in the NSPS provisions of Part A of the Act (see page 13 note 24, *supra*) is applicable as well to the nonattainment program created by Part D. Respondents fail to mention, however, that the NSPS definition in Section 111(a)(3), 42 U.S.C. 7411(a)(3), states expressly that it is applicable only "[f]or purposes of *this section*" (emphasis added)—that is, for Section 111, which was enacted in 1970 and establishes the NSPS program. By its terms, therefore, the NSPS defi-

nition of "source" does not extend to the new source review program.[55]

In fact, the 1977 Senate bill to amend the Clean Air Act contained a provision adopting the NSPS definition for all purposes under the Act. See S. 252, 95th Cong., 1st Sess. § 39(a), at 112 (1977), adding Section 302(m) to the Act, 3 *Leg. Hist.* 686. The House bill contained no such section. The Senate provision was deleted in Conference, and the nonattainment program as passed directed that "[a]ll [state] implementation plan revisions must contain a permit program for new or modified major facilities similar to the program required in the House bill." H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 157 (1977), 3 *Leg. Hist.* 537. At the same time, in enacting Part D Congress did incorporate by reference the NSPS definition of the terms "modifications" and "modified" See 42 U.S.C. 7501(4), incorporating by reference 42 U.S.C. 7411(a)(4). These legislative actions—deleting the Senate provision that expressly adopted the NSPS definition of "source" and incorporating by

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[55] In fact, the nonattainment program and the NSPS program are fundamentally different, so that there is no a priori reason to apply the NSPS definition to new source review. The nonattainment program is confined to areas that do not meet national air quality standards, and it remains in operation only as long as this nonattainment condition continues; in seeking to promote the goal of attainment, the program involves a complex of pollution-control measures, of which new source review is only one (see pages 6-7 and 26-27, *supra*). The NSPS program, in contrast, is applicable to new sources nationwide without regard to the existing quality of air; unlike the nonattainment program, NSPS employs the single technology-forcing approach of uniform federal standards requiring the installation of stringent emission controls on new emitters of pollution. See *Hancock* v. *Train*, *supra*, 426 U.S. at 193. The NSPS definition, which is indifferent to the *net* effect of equipment changes on air quality, surely should not control in the context of new source review, which is inextricably tied to the attainment or nonattainment of ambient air quality standards. The plantwide definition is well suited to the NSR program because it requires new source review in those instances where the prospect of attainment might be threatened by a net increase in emissions.

reference other NSPS definitions—are compelling indications that the 1977 Amendments do not, by silent implication, incorporate the NSPS definition of "source" for purposes of the NSR program.[56]

2. Respondents also have argued (Br. in Opp. 16-21) that the history of the 1977 Amendments shows that Congress intended to deprive the Administrator of all discretion to allow states to use a plantwide approach to new source review. Again, we deal only summarily with this argument here, since we cannot be certain whether respondents will choose to revive it in their brief on the merits. The argument—which failed to convince the court of appeals—rests on an account of the provenance of the 1977 Amendments that is blithely straightforward and unproblematical. Respondents start with the 1976 Senate bill, which, they allege, clearly contemplated a permit program geared to individual pieces of equipment. It was this approach which, they assert, was adopted by the Administrator as the "Emissions Offset Ruling" of December 1976, when the Congress in 1976 failed to enact a statute. It was also adopted without relevant change as the Sen-

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[56] Even if Section 111(a)(3) applied in the new source review program—and we note that the NSR definition promulgated by EPA in fact conforms precisely to the language in Section 111(a)(3) (see 82-1005 Pet. App. A9 n.22)—the agency should have discretion in construing the constituent terms "building, structure, facility, or installation." See *Alabama Power Co.* v. *Costle*, *supra*, 636 F.2d at 396, 398, 410; *ASARCO, Inc.* v. *EPA*, *supra*, 578 F.2d at 324 n.17; see also 82-1005 Pet. App. A9 n.22. Given the differences among the NSR program, the PSD program, and the NSPS program, those constituent terms need not be given a uniform meaning. See *Alabama Power Co.* v. *Costle*, *supra*, 636 F.2d at 397-398. As a matter of linguistic analysis, the terms "facility" and "installation" (as well, of course, as the terms "building" and "structure") can "reasonabl[y] * * * [be] define[d] * * * broadly enough to encompass an entire plant" (*id.* at 396; see also *id.* at 397).

It should also be noted that the Section 111 definition—if it is to apply to the NSR program—is not easily read to authorize—much less require—a *dual* definition of source.

ate's 1977 bill; moved unscathed through Conference; and was passed by both Houses in August 1977.[57]

This account is misleading. The complex legislative history of the 1977 Amendments is in fact anything but straightforward and unproblematical. It casts relatively little light on the specific question before the Court. The 1976 Senate bill did use phrasing that inferentially seems to point to a permit program geared to industrial units short of the entire plant.[58] The 1976 Emissions Offset Ruling is itself not explicit.[59] The 1977 Senate bill looks in two different directions: (a) It abandoned the specific phrase used in the 1976 bill which most powerfully points to an intra-plant unit approach.[60] (b) On the other hand,

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[57] This account is topped off with the suggestion (see Br. in Opp. 3) that the Administrator interpreted the statute as requiring a dual definition until, in a dramatic shift, the present regulations were adopted in October 1981. As we have pointed out, pages 9-14, *supra*, in fact the Administrator interpreted the 1977 statute as permitting a plantwide definition until August 1980 and returned to that interpretation in March 1981.

[58] The 1976 Senate bill created a permit program in nonattainment areas for "a [major emitting] facility proposed for construction or modification at an existing site or plant." S. 3219, 94th Cong., 2d Sess. 43-44 (1976), 6 *Leg. Hist.* 4652-4653. It is the use of the word "facility" in contradistinction to the word "plant" that respondents single out as important. (The bill defined "major emitting facility" as "any stationary source" of a particular capacity, and in turn incorporated the Section 111 NSPS definition of the term "stationary source." S. 3219, *supra*, at 77, 79 (proposed subsections (k) and (m) of Section 302), 6 *Leg. Hist.* 4686, 4688.)

[59] To establish the proposition that the Offset Ruling was equipment (rather than plant) oriented, respondents rely on implications derived from its preamble and on the assertion that the regulation's passing use of the phrase "a source may replace an existing source" must contemplate intra-plant units because "whole plants are almost never replaced." Br. in Opp. 19 n.39.

[60] The 1977 Senate bill substituted the phrase "a [major emitting] facility proposed for construction or modification in such region" for the previous language (see note 58, *supra*), thus eliminating the words "at an existing site or plant." See S. 252, *supra*, at 59, 3 *Leg. Hist.* 633.

the 1977 bill, like the 1976 bill, did incorporate the Section 111 NSPS definition as the relevant definition of the term "stationary source." See S. 252, *supra*, at 110, 112, 3 *Leg. Hist.* 684, 686.

Far more important, however, is that respondents' account is *Hamlet* without the Prince of Denmark. For what emerged from the 1977 Conference was not the Senate version of the permit program, but a Conference bill based on the *House* version. As the Conference Report stated,

> All implementation plan revisions must contain a permit program for new or modified major facilities similar to the program required in the House bill.

H.R. Conf. Rep. No. 95-564, *supra*, at 157, 3 *Leg. Hist.* 537. The House bill did not incorporate the NSPS definition of "source"; nor did the Conference bill. The House bill did not use the term "facility * * * at an existing site or plant" to describe the unit subject to new source review; like the Conference bill, it required a permit program for the construction of any "new or modified major stationary source," leaving the word "source" undefined. See H.R. 6161, 95th Cong., 1st Sess. 350-351 (1977), 4 *Leg. Hist.* 2335-2336. Most significantly, it was the nonattainment provisions of the House bill that were authoritatively reported as having, as their two "main" purposes, (a) "allow[ing] reasonable economic growth" while the area makes "reasonable further progress" toward attainment, and (b) "allow[ing] States *greater flexibility* for the former purposes *than EPA's present interpretive regulations afford.*" See H.R. Rep. No. 95-294, *supra*, at 211 (emphasis added), 4 *Leg. Hist.* 2678.

Surely all this makes clear that it was *not* the Congress's purpose simply to codify the approach of the 1976 or 1977 Senate bills or the 1976 Emissions Offset Ruling. Indeed, Congress wished the States to have *more* flexibility to create a balanced approach in accommodating growth to the achievement of attainment than the 1976

Ruling permitted. Given this explicit statement, it would surely be remarkable to conclude that the Congress in 1977 sub silentio froze into place the 1976 Ruling's ambiguous bar against a plantwide approach to the NSR permit program.

We do not argue here that the evidence shows that a plantwide approach was expressly in mind when the Conference adopted the House version and eliminated the textual phrases that might have restricted the Administrator's discretion to afford the states this form of flexibility. Although there is some indication that Congress was aware of the need for administrative discretion in implementing the NSR program,[61] and although in the debates references were made to an *entire* plant or facility as constituting a "source," [62] a balanced reading of the legislative history leads to the conclusion that nobody in Congress focused sharply or pointedly on the difference between a plantwide or a dual definition. Congress simply did not address or resolve this issue.

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[61] The 1977 Senate Report stated that EPA "must be given some discretion" to identify those situations in which "new facilities * * * will prevent attainment or maintenance of a national air quality standard" and thus "requir[e] the most rigorous assessment and stringent limitations" (S. Rep. No. 95-127, *supra*, at 56, 3 *Leg. Hist.* 1430).

[62] For instance, Representative Waxman referred to a "stationary source" as "utilities, refineries, smelters and so forth," and he mentioned that "stationary sources" that were out of compliance with emissions limitations included "coal-fired powerplants, * * * steel complexes, * * * nonferous smelters, * * * large refineries, * * * commercial boilers, and * * * municipal boilers * * *." 123 Cong. Rec. 16202 (1977), 4 *Leg. Hist.* 3050, 3051. Senator Muskie referred to "a powerplant" as a "source." 123 Cong. Rec. 18023 (1977), 3 *Leg. Hist.* 730; see also 123 Cong. Rec. 18035 (1977), 3 *Leg. Hist.* 763 (chart). Similarly, Senator McClure submitted for the record an EPA memorandum that listed "source categories" including lime plants, sulfur recovery plants, carbon block plants, pulp mills, copper smelters, petroleum refineries, cement plants, and iron and steel mills. 122 Cong. Rec. 24549 (1976), 6 *Leg. Hist.* 5262-5263.

If we are correct in this conclusion, what is its consequence for this case? We submit that the answer is clear. Congress legislates in full contemplation of the conventional rule that the Administrator is deemed to have authority in normal course to construe and implement the statute with respect to matters not legislatively determined. Congress made it clear that in doing so, the Administrator should adopt a balanced approach to the problem of accommodating growth to attainment, and should leave the states some flexibility in their implementation of attainment programs. Since EPA exercised its discretion by adopting a regulation that is reasonably designed to effectuate the various policies of the Act, that leaves states a sensible flexibility to adapt their attainment programs to local conditions, and that holds air quality harmless on the road to attainment, its regulations should be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDUM

40 C.F.R. 51.18(j) provides in pertinent part:

(j) State Implementation Plan provisions satisfying sections 172(b)(6) and 173 of the Act shall meet the following conditions:

(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:

(i) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(ii) "Building, structure, facility, or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual*, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

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